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In the Supreme Court of the United States

OCTOBER TERM, 1978

TUG OCEAN PRINCE, INC. and RED STAR TOWING & TRANSPORTATION CO., PETITIONERS

v.

UNITED STATES OF AMERICA and PITTSTON MARINE TRANSPORT CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-27) is reported at 584 F.2d 1151. The opinion of the district court (Pet. App. B-1 to B-42) is reported at 436 F. Supp. 907.

JURISDICTION

The judgment of the court of appeals (Pet. App. E-1 to E-3) was entered August 7, 1978. A petition

for rehearing was denied on September 26, 1978 (Pet. App. D-1 to D-2). The petition for a writ of certiorari was filed on December 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners are entitled to limit their liability to the federal government under the Federal Water Pollution Control Act, 33 U.S.C. 1321, for the costs of cleaning up an oil spill.

STATEMENT

On February 3, 1974, a barge loaded with oil and in the forward tow of the Tug OCEAN PRINCE ran aground on a charted rock near Bear Mountain Bridge in the Hudson River. The resulting spill was cleaned up at great cost, and the United States sought to recover these costs from petitioners.

The tug's deck crew consisted of two pilots (Walter Reimer and John Kiernan) and two deckhands (Pet. App. A-4 to A-5). Reimer had been employed on the OCEAN PRINCE for approximately one and a half years, but he had never piloted on the Hudson River (*ibid.*). Red Star intended Kiernan, who had experience on the Hudson, to be captain and Reimer to be mate, but the dispatcher did not inform either Kiernan or Reimer of this intent, and no one told Kiernan that Reimer had never piloted on the Hudson (*id.* at A-5). Kiernan and Reimer both thought that the other was the captain (*ibid.*).

At the time the tug struck the rock, the inexperienced Reimer was at the wheel. There was no lookout; the deckhand on watch had gone below for coffee. It was dark, the tide was ebbing, there was ice in the river, and there were snow flurries (Pet. App. A-6). The rock was marked by an unlighted can buoy and could be located by bearings on a light tower on nearby Con Hook Island (*id.* at A-5). Reimer looked for the buoy, but it apparently was obscured by ice,[1] and he did not find it before the collision. He did not attempt to locate it by means of bearings on the light tower nor did he obtain assistance from Kiernan (*id.* at A-6, A-18).

Petitioners, the owner and charterer of the Tug OCEAN PRINCE, sought to limit their liability under 46 U.S.C. 183 *et seq.*[2] (Other parties sought other relief (Pet. App. A-2 to A-3), but we do not discuss their claims here.)

The district court, after a trial, found that the accident had been caused primarily by errors in navigation on the part of Reimer,[3] but it held that petition-

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[1] The Coast Guard Light List and Coast Pilot warned against relying on the can buoy in icy conditions (Pet. App. A-5 to A-6).

[2] 46 U.S.C. 183(a) limits the liability of the owner of any vessel for collision loss, damage or injury incurred "without the privity or knowledge of such owner."

[3] The district court also ruled that the government was not negligent, rejecting petitioners' claim that more adequate navigational aids should have been provided (Pet. App. B-32). The court of appeals affirmed this holding (Pet. App. A-19 to A-20).

ers were entitled to limitation of liability because they had established that these errors were not within their "privity or knowledge." This allowed liability to be limited under 46 U.S.C. 183 to the value of the vessel and shipment. Liability also was limited under the Federal Water Pollution Control Act, the court held, because the discharge was not the "result of willful negligence or willful misconduct within the privity and knowledge of [the owner]." See 33 U.S.C. 1321(g). This statute creates a limit of $100 per gross ton of the vessel involved.[4]

The court of appeals reversed in part, holding that the district court erred in concluding that the errors that caused the accident were not within petitioners' "privity or knowledge." It stated that any loss by reason of the owner's failure to provide a competent master is within the owner's privity under established doctrine (Pet. App. A-7), and it concluded that petitioners had failed in this regard because they had entrusted the operation of the tug to an inexperienced pilot (Pet. App. A-16). Petitioner Red Star's "management knew of Reimer's lack of experience on the Hudson River, knew of the conditions to be encountered, knew that he would stand night watches, clearly failed in its duty to exercise due diligence and sent out a ship unseaworthy because not properly manned

[4] At the time of the accident the limit was $100 per gross ton of the vessel that caused the discharge, or $14 million, whichever was less. The statutory limit has since been increased substantially (Pub. L. No. 95-217, 91 Stat. 1595 (1977)).

under the existing conditions" (Pet. App. A-11 to A-12). The court also held that petitioners' failure to require a lookout, which violated a statutory duty and contributed to the collision, was by itself an error within their privity or knowledge that provided a basis for denying limitation of liability under 46 U.S.C. 183 (Pet. App. A-16 to A-19). Finally, the court concluded that petitioners' reckless disregard of the consequences of their various omissions amounted to "willful negligence or willful misconduct" that precluded petitioners from limiting their liability to the federal government for cleanup costs under the Federal Water Pollution Control Act (Pet. App. A-20 to A-26).

ARGUMENT

1. The Federal Water Pollution Control Act provides (33 U.S.C. 1321(g)) that if the owner of a vessel from which oil is discharged in violation of the Act proves that the discharge was caused solely by a third party, the third party shall be liable to the United States for the actual costs incurred under the Act for removal of the oil. This liability is limited by statute, however, unless the United States can show that the discharge was "the result of willful negligence or willful misconduct within the privity and knowledge of such third party;" in that case, the third party is liable for the full amount of the removal costs.

Petitioners contend (Pet. 9-15) that the court of appeals erred in construing "willful" misconduct to include an act or omission that is "intentional" and

"done in such a way as to allow an inference of a reckless disregard of the probable consequences" (Pet. App. A-24). They contend that the government must prove actual knowledge of probable injury (Pet. 14) and assert that there was no evidence of such knowledge on their part (Pet. 11).

But in construing statutes that impose civil penalties, this Court has held that "willful" misconduct characterizes " 'conduct marked by careless disregard whether or not one has the right so to act.' " *United States* v. *Illinois Central R.R.*, 303 U.S. 239, 242-243 (1938); see also *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 185 (1973); *Western Waterproofing Co.* v. *Marshall*, 576 F.2d 139, 142-143 (8th Cir. 1978), cert. denied, No. 78-362 (Nov. 13, 1978). There is no reason to believe that Congress did not have this accepted definition of "willful" misconduct in mind when it enacted 33 U.S.C. 1321(g),[5] particularly because the Congress used the terms "willful misconduct" and "willful negligence" in the alternative in the statute. Willful negligence generally connotes reckless indifference to consequences where a high degree of danger is apparent. W. Prosser, *Law of Torts* 184-186 (1971). It is unreasonable to suppose, as petitioners do, that Congress intended to reach only owners who intentionally caused their ship to

[5] *United States* v. *Hamel*, 551 F.2d 107 (6th Cir. 1977), on which petitioners rely (Pet. 11-12), is not to the contrary. That was a criminal case construing the provisions of the Federal Water Pollution Control Act that contain criminal penalties.

collide with another ship with actual knowledge that an oil spill would result; " 'such intent on the part of a[n owner] is hardly within the pale of actual experience or reasonable supposition.' " *United States* v. *Illinois Central R.R.*, *supra*, 303 U.S. at 243. See also Pet. App. A-26.[6]

2. Petitioners also complain (Pet. 15-18, 20-22) that the court of appeals neglected to determine that the omissions that caused the accident were within petitioners' "privity and knowledge," as required by 33 U.S.C. 1321(g).

But the court of appeals explicitly concluded that petitioners' failures were committed by their management, not simply by employees. It held that management was aware of the pilots' practice of sending a deckhand for coffee (thus eliminating the lookout) and failed to take steps to alter it even when navigation became dangerous (Pet. App. A-25). It further held that management failed to designate a captain and to inform Kiernan that Reimer was not

[6] Petitioners also contend that, because the court of appeals conceded that individual omissions, such as Reimer's unfamiliarity with the river, may not have been "willful misconduct" (Pet. App. A-26), the court could not consider all of petitioners' acts together in concluding that petitioners acted with reckless disregard of the consequences. But a series of failures—including petitioners' failure to inform Kiernan that Reimer was unfamiliar with the river, their failure to appoint a captain, and their failure to require a lookout under the circumstances (see Pet. App. A-24)—is highly probative. The court properly concluded that this combination of errors and omissions could not have occurred in the absence of recklessness.

familiar with the Hudson (*ibid.*). There is no reason for this Court to review the adequacy of these primarily factual determinations.[7]

3. In discussing limitation of liability under 46 U.S.C. 183, the court of appeals reversed the district court's determination that failure to post a lookout did not contribute to the casualty. In doing so, it invoked the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 136 (1874), which requires a ship that has violated a statutory duty intended to prevent collisions to show that its fault "could not have been" the cause of the collision. The court applied this rule because petitioners had failed to comply with the statutory duty to maintain a proper lookout (see 33 U.S.C. 221). It held that petitioners had failed to show that the absence of the lookout "could not" have caused the collision, and accordingly it concluded that their failure to post a lookout must be considered a cause of the accident. Because this failure was within their privity and knowledge, the court concluded that petitioners could not limit their liability under 46 U.S.C. 183.

Petitioners now contend (Pet. 18-20) that the court improperly applied the rule of *The Pennsylvania* in

[7] Petitioners contend (Pet. 22-26) that the decision here conflicts with the Fourth Circuit's decision in *The Temple Bar*, 137 F.2d 293 (1943), because the Second Circuit has required a vessel operated in river navigation to have a pilot experienced in those waters. But the Fourth Circuit in *The Temple Bar* expressly recognized that river and harbor navigation requires an experienced pilot; the Fourth Circuit's opinion applied only to ocean navigation. See 137 F.2d at 297.

its later discussion of petitioners' liability for the oil spill and thereby incorrectly relieved the government of its statutory burden of proof, under 33 U.S.C. 1321(g), of showing willful misconduct.

But there is no suggestion in the court of appeals' opinion that it relieved the government of showing that petitioners acted recklessly. The court did not rely on *The Pennsylvania* in this portion of its discussion, nor did it need to. The court earlier had held, independent of its discussion of that case, that "it would be a matter of pure speculation to say that a proper lookout would not have seen and reported" the critical navigation light (Pet. App. A-18).[8] The court therefore had no difficulty, even apart from the *Pennsylvania* rule, in concluding that failure to post a lookout caused the accident.

From this starting point, the government adequately demonstrated that "under the circumstances existing the ordinary practice of seamen required the keeping of a proper lookout at that time and place" (Pet. App. A-18, A-25), and that failure to keep a proper lookout was reckless conduct in disregard of an express statutory duty intended to prevent collisions (see 33 U.S.C. 221).

[8] Contrary to petitioners' apparent suggestion (Pet. 20), the district court did not hold that it was impossible to get a bearing using the light (see Pet. App. B-13).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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